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AFFIN-ACF FINANCE BHD

v.

MERIPLEX SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL SUIT NO: D4-22-977-2003]
23 AUGUST 2010

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CONTRACT: *Novation - Existence of - Assignment of hire-purchase agreements - Whether only benefit under agreements assigned - True nature of assignment - Whether hybrid novation agreement created to make 'assignee' liable for hire-purchase instalments for use of goods - Whether owner had duty or discretion to repossess hired goods - Whether owner's failure to give credit for value of hired goods affected claim - Contracts Act 1950, ss. 92, 94*

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The plaintiff sued the first defendant as principal and the second and third defendants as guarantors to recover RM270,226.41 owing under two hire-purchase agreements. The first defendant was not the original hirer under the agreements. The original hirer, due to its inability to manage the repayments, had, with the plaintiff's consent, 'assigned' the two agreements to the first defendant by way of two agreements known as 'Direct Hire Purchase Assignment to Third Party'. Under these agreements, *inter alia* (i) all rights, title and interest of the original hirer under the hire-purchase agreements were assigned to the first defendant (ii) the first defendant undertook to perform and discharge all obligations and liabilities of the original hirer and (iii) both the original hirer and the first defendant were jointly and severally liable for the performance and discharge of the obligations and liabilities under the hire-purchase agreements. Although the 'assignment agreements' were declared to be between the plaintiff, the first defendant and the original hirer, the plaintiff did not sign the agreements but only witnessed the signatures of the original hirer and the first defendant. Two guarantees were also executed by the second and third defendants to jointly and severally guarantee the first defendant's payments under the 'assignment agreements'. Following the first defendant's defaults under the 'assignment agreements' the plaintiff made attempts to repossess the hired equipment but was unsuccessful.

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The first defendant denied liability to pay claiming (i) the 'assignment agreements' only assigned to it the benefit under the original hire purchase agreements and not the burden (ii) the plaintiff was not privy to the 'assignment agreements' as it failed to sign the same and therefore had no right to enforce them, and (iii) even if the plaintiff had the right to enforce the agreements, its failure to give credit for the value of the hired equipment invalidated its claim. The second and third defendants also denied liability under the guarantees for failure of consideration. They argued the consideration for the guarantees was that the plaintiff would sign the 'assignment agreements' and become a party thereto. The guarantors also argued that the equipment under the hire-purchase agreements were a 'security' to the benefit of which they were entitled within the meaning of ss. 92 and 94 of the Contracts Act 1950. They said the plaintiff's failure to repossess and sell the equipment resulted in the 'loss' of the 'security' that rendered the guarantees void.

Held (allowing the plaintiff's claim with costs):

(1) The plaintiff was a party to the 'assignment agreements'. The absence of the plaintiff's signature in itself was insufficient to detract from such a conclusion. The agreements were therefore valid and enforceable against the first defendant and the guarantors. (paras 29-30 & 32)

(2) The agreements bore the features of a novation agreement *albeit* with hybrid features rather than a bare assignment. The first defendant undertook the liability of the original hirer and enjoyed, in turn, the benefit of the goods. Even if the agreement was viewed as an assignment, the first defendant could not enjoy the benefit of the goods without payment of the hire-purchase instalments. The benefit and the burden were not severable. (para 29).

(3) The several Memoranda to Repossess issued after the defendant's default established *prima facie* evidence of attempts made to repossess the equipment under the agreements. The contention that there were never any attempts to repossess was not made out. (paras 35-36)

(4) Clause 10.3 of the hire-purchase agreement conferred upon the plaintiff a discretion whether or not to repossess the equipment and not a duty to repossess. The clause allowed for crediting only where repossession occurred. Where there

was no repossession, no valuation or crediting could be accorded to the hirer because the equipment, not having been repossessed, could not be either sold or valued. (paras 41-42)

(5) The first defendant made no attempt to surrender or arrange for the return of the equipment to the plaintiff, even after its business closed down. The equipment was abandoned at the premises. The reason for the deterioration and decay of the equipment lay with the defendants and not the plaintiff. (paras 44-45)

(6) The hired goods belonged to the plaintiff and could not comprise 'security' as envisaged by the guarantors. Sections 92 and 94 of the Contracts Act 1950 were inapplicable. (paras 47-49)

Case(s) referred to:

Chung Khiaw Bank Ltd v. Penang Garden Sdn Bhd [1990] 2 CLJ 621; [1990] 1 CLJ 748 (Rep) HC ***(refd)***

Cox v. Bishop [1857] 8 De G M & G 815 ***(refd)***

HSBC Bank Malaysia Berhad v. LH Timber Products Sdn Bhd & Ors [2005] 8 CLJ 249 HC ***(foll)***

Lynxsquare (M) Sdn Bhd & 2 Ors v. UOL Credit Sdn Bhd [2000] 1 LNS 104 HC ***(foll)***

Supreme Leasing Sdn Bhd v. Lee Gee & Ors [1987] 1 LNS 145 HC ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 92, 94

For the plaintiff - Rajes Raghavni (Farisha Mohamed with her); M/s Rajes Hisham Pillai & Gopal

For the defendants - Raj Kumar (PY Chong with him); M/s Kumar & Assocs

Reported by Ashok Kumar

JUDGMENT

Nallini Pathmanathan J:

Introduction

[1] In this action, the plaintiff seeks to claim from the first defendant, Meriplex Sdn. Bhd. ('the 1st defendant') the balance of hire purchase instalments totalling RM270,226.41. The first defendant is not the original hirer of the goods comprising the subject matter of the hire-purchase agreements, but is a third

party to whom the hire purchase agreements were assigned in or around 1999. The 1st defendant maintains that it is under no liability to make the said instalment payments as by virtue of the assignment agreement, only the benefit under the original hire purchase agreements (as varied) were assigned, and not the burden. Moreover it is contended that as the plaintiff did not execute the assignment agreement between itself and the original hirer, it is not privy to the arrangement either.

[2] As against the second defendant, Manokaran a/l Veraya ('2nd defendant') and the third defendant, Bawani a/p Ganesan ('the 3rd defendant'), the plaintiff seeks repayment of the said sum of RM270,225.41 together with interest on the premise that they jointly and severally guaranteed the due and punctual payment by the 1st defendant of all sums due. The 2nd and 3rd defendants maintain that the guarantees they executed are invalid as the consideration for those guarantees was that the plaintiff would be a party to the assignment agreement between the 1st defendant and the original hirer and as the plaintiff did not execute the consideration for the provision of such guarantees has failed. Accordingly they deny liability for the said sum or any part thereof.

[3] Alternatively the defendants contend that even if the agreements executed are valid and enforceable, then the plaintiff has failed to take any steps to repossess the goods and sell the same, according the defendants credit for the sale value realised. Failing a sale, they maintain that under the provisions of the hire purchase agreements, the plaintiff is bound to effect a valuation of the equipment and accord them due credit for such value. As the plaintiff failed to do so, the 1st defendant disputes its liability for the sum claimed. As for the 2nd and 3rd defendants, who are guarantors, they maintain that the equipment comprised 'security' under the hire purchase agreements and that the plaintiff's failure to realise the security has rendered the guarantees void by virtue of s. 92 of the Contracts Act 1950.

[4] The primary issues that arise for consideration therefore are:

(i) The effect and purport of the 'Direct Hire Purchase Assignment to Third Party' and more particularly whether the 1st defendant undertook the obligations and liabilities of the original hirer under the original hire purchase agreements or is released from any such obligation by reason of the plaintiff not having executed the agreement;

A (ii) Whether the guarantee dated 8 April 1999 executed by the 2nd and 3rd defendants is valid and enforceable or invalid for want of consideration;

(iii) Alternatively, whether the failure of the plaintiff to repossess
B the equipment exonerates or diminishes the 1st defendant's liability under 'Direct Hire Purchase Assignment to Third Party' agreement or discharges the liability of the 2nd and 3rd defendants as guarantors.

C **Salient Facts**

[5] *Vide* vesting order dated 26 May 2005 the rights and liabilities of Asia Commercial Finance (M) Berhad were vested in Affin-ACF Finance Berhad who is therefore the plaintiff in this action.

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[6] On 18 October 1995 and 16 July 1996 respectively the plaintiff entered into two hire-purchase agreements with one Kheshini Industries Sdn. Bhd. ('the original hirer') to finance the purchase of goods related to the manufacture of shoes and as
E specified in detail in the annexure to the plaintiff's statement of claim described as 'Lampiran 1'. This is not in dispute. The hire-purchase price under the first agreement was RM343,133.60 while that under the second hire purchase agreement was RM177,067.75. It is pertinent that the Hire-Purchase Act 1967
F is inapplicable to these transactions as the goods comprising the subject matter of the agreement are not a part of the schedule to the Hire Purchase Act 1967.

[7] Soon after entry into these hire purchase agreements the
G original hirer faced problems in making the monthly repayments as it was bound to, under the express terms and conditions. Upon the original hirer's request the plaintiff agreed to reschedule the payments due and entered into two variation agreements dated 14 July 1998. Under the terms of the variation agreements, the
H plaintiff effectively rescheduled the arrears of instalment payments due and extended the tenure of the hire purchase agreements to a term of sixty months from the date of the variation agreements with interest levied at a rate of 12% per annum. These variation agreements are also not in dispute.

I **[8]** Notwithstanding the leeway accorded to the original hirer, it still experienced difficulties in meeting the requisite instalment payments. The 1st defendant then requested the plaintiff to

consent to the assignment of the hire-purchase accounts from the original hirer to the 1st defendant. *Vide* letter dated 31 March 1999 the plaintiff wrote to the 1st defendant stating that the plaintiff had approved the 1st defendant's proposal for an assignment of the original hirer's hire purchase accounts subject to compliance with the following conditions, namely that:

(a) All arrears under the restructured hire purchase agreements be updated or made current;

(b) The then subsisting guarantors to be replaced by the 2nd defendant and the 3rd defendant; and

(c) The payment of an assignment fee of RM100. It was expressly stipulated that all other terms and conditions would remain unchanged.

[9] Pursuant to this, on 8 April 1999 two direct Hire Purchase Assignment to third party agreements were executed on template forms bearing the plaintiff's letterhead, by the 1st defendant and the original hirer. As these agreements comprise the crux of the dispute between the parties, the contents are of significance. The two agreements are stated to be made between the original hirer of the first party, known as the assignor, and the 1st defendant known as the assignee of the second party as well as the plaintiff known as the owner of the third party. Reference is made to the original hire purchase agreements as well as the variation agreements and it is stipulated that the goods specified there were let to the original hirer or assignor on the terms set out therein.

[10] The direct Hire Purchase Assignment to third party agreements then go on to provide that in consideration of the sum of RM1 paid by the 1st defendant as assignee to the original hirer as assignor, all the rights title and interest of the original hirer under the original hire purchase agreements are assigned and transferred to the 1st defendant. The second clause provides that in consideration of the owner consenting to this assignment, the first defendant undertakes with the original hirer to perform and discharge all the obligations and liabilities of the original hirer under the hire purchase agreements.

[11] The third clause provides that the said 'assignment' does not release or discharge the original hirer from performance of the obligations and liabilities under the hire purchase agreements.

[12] The fourth clause provides that from the date of the 'assignment' both the original hirer and the 1st defendant shall be liable jointly and severally for the performance and discharge of the obligations and liabilities under the hire purchase agreement. The owner did not execute the agreement, save for witnessing the signatures of the original hirer and the 1st defendant.

[13] *Vide* two guarantees dated the same day, ie, 8 April 1999, the 2nd and 3rd defendants jointly and severally guaranteed the due and punctual payment by the 1st defendant of all sums due and owing to the owner under the assignment agreements. The consideration stated in the guarantees is stated as follows: 'In consideration of your (the plaintiff) entering into an assignment agreement dated 8 April 1999 ...'

[14] Subsequent to the execution of the Direct Hire Purchase Assignment to third party agreements and the joint and several guarantee by the 2nd and 3rd defendants on 8 April 1999, the plaintiff *vide* letters dated 8 April 1999 served the agreements on the 1st defendant and stated the terms of payments of the said accounts. The 1st defendant wrote to the plaintiff on 15 April 1999 requesting for a break in the payment of the monthly instalment as well as a reduction in the interest charged. The plaintiff responded to the 1st defendant advising that it had approved their request for a grace period of two months. The plaintiff requested that the 1st defendant update their accounts gradually.

[15] Thereafter the 1st defendant paid several monthly instalments as it had contracted to do directly to the plaintiff. However sometime in 2000, the 1st defendant defaulted in the repayment of the instalments due resulting in the plaintiff issuing a Notice of Intention to Repossess for unscheduled goods on or around 21 June 2000. The defendants did not respond to this notice. As there was no response the plaintiff issued a memorandum to repossess dated 29 December 2000 but the plaintiff maintains that the attempt to repossess the goods was unsuccessful as the premises were locked at the time. In her evidence, Mariam binti Harith, PW1 ('PW1') testified from her records that several attempts were made to repossess the equipment but to no avail. More particularly reference was made to memoranda to repossess dated 29 December 2000, 26 January 2001 and 16 February 2001, all of which were stated by the plaintiff to be unsuccessful. After the issuance of these

memoranda, on 21 February 2001, the defendants enclosed a further two months' instalment payment. This was the final payment made by them. A further memorandum to repossess was issued on 28 March 2000, 13 April 2001 and then some time later on 6 May 2002, 11 June 2002, 25 November 2002 and finally on 7 April 2003. In the course of the issuance of these memoranda to repossess, the plaintiff also caused its solicitors to issue letters of demand for monies due, but to no avail.

[16] In the course of cross-examination PW1 was challenged on her evidence relating to the repossession. She was asked whether she had any basis to show or prove that there were in reality actual attempts to repossess the goods. The defendants maintained that there were no attempts actually made to repossess the goods and that in reality the plaintiff had effectively 'abandoned' the goods. They sought evidence from the plaintiff's records to corroborate PW1's statements that access to the premises had been blocked. Dato' Manokaran a/l Veraya, DW1 ('DW1') maintained in the course of his evidence that he did not believe that any attempts had been made to repossess the goods because he would have been so advised if that were the case, as he effectively conducted the business of the 1st defendant and had stationed a representative at the factory. Further he stated that the premises, being a manufacturing concern was operated throughout the week and access could not have been blocked.

[17] PW1 looked through her records and was unable to provide any details from the agents instructed to repossess the goods. In other words, she was unable to provide any reasons for the inability to repossess the goods.

[18] It is relevant in this context that in May 2001, the plaintiff did manage to gain access to the premises to conduct an audit and take photographs of the equipment. It is also relevant to note that notwithstanding the fact that no further instalment payments were made after May 2001, the 1st defendant itself took no steps to procure the plaintiff to take back the equipment or to surrender the same but continued to make full use of the same until business operations ceased sometime in 2004.

[19] As stated at the outset DW1 speaking on behalf of the 1st defendant testified that the equipment was left at the premises because, he contended, it was the plaintiff's obligation to take possession of the equipment. It is noteworthy that no attempt

was made to advise the plaintiff that the business operations had ceased and that the equipment was available for repossession as it had been left behind. The equipment was therefore simply left abandoned.

[20] In the interim the plaintiff had also instructed its solicitors to issue demands. Numerous demands were issued to which no response was received save for one occasion. On 22 July 2002, solicitors for the 1st defendant responded to the numerous demands, claiming that the Direct Hire-Purchase Assignment agreement dated 8 April 1999 was invalid as the original hirer was a mere bailee and had no power to pass good title to a third party. Additionally it was also stated that the plaintiff was not a party to the aforesaid agreement. They further maintained that the 1st defendant had 'inadvertently' made the monthly instalments under the said agreement and demanded a refund in return for a return of the equipment. The plaintiff's solicitors responded maintaining that the hirer was entitled to assign its rights title and interest under the hire purchase agreements and that it was clearly a party to the agreement. As such it maintained that the Direct Hire-Purchase Assignment agreement was valid as were the guarantees. As there was no resolution, the plaintiff commenced legal proceedings.

Issues

Issue (i): The Effect And Purport Of The 'Direct Hire Purchase Assignment To Third Party' And More Particularly Whether The 1st Defendant Undertook The Obligations And Liabilities Of The Original Hirer Under The Original Hire Purchase Agreements Or Is Released From Any Such Obligation By Reason Of The Plaintiff Not Having Executed The Agreement

[21] What then is the effect and purport of the Direct Hire Purchase Assignment to third party agreement dated 8 April 1999? A perusal of the same discloses that it is a tripartite agreement between the original hirer or the assignor, the 1st defendant or the assignee and the owner or the plaintiff. This is evident from a plain reading of the preamble. However the owner has not actually executed this document, save that its representative witnessed the signatures of the original hirer and the 1st defendant.

[22] As stated earlier it provides for the 1st defendant as assignee to:

(a) Receive the benefit of the rights title and interest under the hire purchase agreements; and

(b) Undertake the obligations and liabilities of the original hirer or assignor under the hire purchase agreements.

[23] From the foregoing it is evident that apart from assigning the rights, title and interest in the hire purchase agreements, the obligations and liabilities under those same agreements are also undertaken by the 1st defendant. The issue that arises for consideration is whether or not this is tenable. The 1st defendant maintains that an assignment cannot have the effect of transferring the burden or liabilities of the assignor or the original hirer to itself. An assignment only allows for the transfer of a benefit and not a burden.

[24] However the document agreement in issue specifically provides for such burden to be undertaken by the 1st defendant. It must also be considered that the agreement is stated to be a tripartite agreement whereby the owner of the goods in question allows or consents to the transfer of not only the benefit, but also the burden and liabilities arising under the hire purchase agreements to pass to the 1st defendant. Therefore the effect of this Direct Hire Purchase Assignment to Third Party Agreement is to alter the original contract or novate the same such that the 1st defendant becomes liable for the monies due under the hire purchase agreements. Although the said agreement is labelled an assignment, it does not follow that it is an assignment in law. It is incumbent upon this court to look to the substance of the document, rather than its label to try and ascertain, objectively the intention of parties.

[25] Having done so, it appears evident to this court that put simply, the original hirer was unable to keep up with its instalment payments and found the 1st defendant to substitute it or take its place. However such a substitution of the 1st defendant in the hire purchase contracts could not take place without the express consent of the plaintiff, as the plaintiff was and remains to date, the owner of the subject goods. Accordingly there was a need for the plaintiff's express consent to the 1st defendant 'taking-over' or substituting the original hirer under the hire purchase agreements.

[26] The consent of the owner or the plaintiff is apparent from:

(a) Its letter consenting to the substitution of the 1st defendant for the original hirer, subject to conditions set out in its letter of 8 March 1999;

(b) The express reference in the Direct Hire Purchase Assignment to third party agreement to all three parties – this shows that all three parties involved were cognisant of, and consented to the new contract or arrangement whereby the equipment would be transferred to the 1st defendant together with the liability to make repayments under the hire purchase agreements as well as update the outstanding arrears, which the 1st defendant duly did;

(c) The Direct Hire Purchase Assignment to third party agreement was prepared by the owner on its own template bearing its letterhead thereby bearing out the fact that it approved or consented to the entire arrangement;

(d) The owner or the plaintiff is expressly referred to in the Schedule to the agreement further bearing out the fact that it is tripartite in nature;

(e) The owner's representative witnessed the signatures of the original hirer as well as the 1st defendant.

[27] As against this, the 1st defendant maintains that the plaintiff did not actually execute the agreement and is therefore not a party to the same. It is not in dispute that the signature of the plaintiff does not appear on the agreement.

[28] I have considered this issue in the entirety of the circumstances surrounding this transaction. I am satisfied that the Direct Hire Purchase Assignment to Third Party Agreement could not have been executed by the original hirer or assignor and the 1st defendant or assignee without the express consent of the owner of the goods, ie, the plaintiff. The tenor of the agreement as drafted also makes reference to all three parties. Accordingly it seems to this court that the mere absence of the signature of the plaintiff as the owner of the goods does not detract from the fact that the plaintiff expressly acquiesced to the substitution of the 1st defendant in place of the original hirer and oversaw the entire process. It is not possible to ignore the plaintiff's participation and oversight over this transaction, given that it is the owner of the

equipment. Moreover, the 1st defendant sought such consent prior to such substitution. It also made the requisite payments to the 1st defendant after the execution of the agreements. It did not make the payments to the original hirer. The contention raised by the defendants relating to the alleged invalidity of the assignment agreement and guarantees only came about after the commencement of legal proceedings, and was very much an afterthought. Even if such a contention was truly believed to be the case by the defendants, there is no evidence to show that they made any such payments to Keshini Industries, the original hire instead. The lack of *bona fides* in this contention is therefore apparent.

[29] If one were to ask who the 1st defendant had to sue in the event the equipment had been wrongfully repossessed, the answer would be the plaintiff under the said agreement, rather than the original hirer. All these factors point clearly to the existence of a contract more in the form of a novation, than a bare assignment, notwithstanding the title of the document. Under the agreement, the 1st defendant undertook not only the benefit but also the burden under the hire purchase agreements with the plaintiff's consent. I therefore find as a fact, on the evidence before this court that:

(a) On the entirety of the facts and the circumstances surrounding the transaction, the plaintiff was a party to the agreement, namely the Direct Hire Purchase Assignment to Third Party agreement. The absence of the plaintiff's signature in itself is insufficient to detract from or negate such a conclusion.

(b) The said agreement bears the features of a novation agreement, *albeit* with hybrid features rather than a bare assignment. In effect from the date of the agreement, the 1st defendant undertook the liability of the original hirer and enjoyed in turn the benefit of the goods. The agreement differs from a classic novation agreement in that it does not state that the 1st defendant 'steps into the shoes' of the original hirer such that the original hirer is released. Here there is an additional clause making the original hirer jointly and severally liable with the 1st defendant. This clause may well have been a problem if the plaintiff had sought to procure judgment against the original hirer as well as the 1st defendant. However that is not the case here. The plaintiff seeks recourse under the agreement against the 1st defendant that that has

undertaken the liabilities and obligations of the original hirer together with the benefit. The validity or otherwise of such a clause is for the original hirer to dispute, not the 1st defendant who expressly undertook and fully understood and consented to making the requisite hire purchase instalment payments in return for the hire of the equipment.

(c) In any event even the agreement is viewed as an assignment, as stated by Dzaiddin J (as he then was) in the case of *Chung Khiaw Bank Ltd. v. Penang Garden Sdn. Bhd.* [1990] 2 CLJ 621; [1990] 1 CLJ (Rep) 748 citing Vaughan Williams LJ in *Cox v. Bishop* [1857] 8 D M & G 815 473 although an assignment does not effect the transfer of a burden in certain circumstances an assignee may not be able to enjoy the benefits assigned without also assuming the obligations. It was held as follows:

> For example an instrument may be framed so that it confers a right that is conditional on certain restrictions being observed or certain burdens assumed. This is known as the conditional benefit principle. In *Tito v. Waddell* *Megarry* VC distinguished this conditional benefit principle with a "pure principle of benefit and burden."

In the instant case it is evident that the 1st defendant could not enjoy the benefit of the goods without payment of the hire purchase instalments. In other words the benefit and the burden are not severable.

[30] It also cannot be said that there is no consideration for the novation or agreement because the consideration moving from the plaintiff to the 1st defendant is the hire of the goods, a benefit which the 1st defendant received but has refused to pay for. It therefore seems clear to this court that the Direct Hire Purchase Assignment to Third Party Agreement is valid and enforceable against the 1st defendant.

Issue (ii): Whether The Guarantee Dated 8 April 1999 Executed By The 2nd And 3rd Defendants Is Valid And Enforceable Or Invalid For Want Of Consideration

[31] The 2nd and 3rd defendant maintains in essence that the guarantees they executed dated 8 April 1999 are invalid for want of consideration. This they maintain is because the guarantee expressly provides that the consideration is that of the plaintiff entering into the assignment agreement dated 8 April 1999 with

the original hirer as well as the 1st defendant. As the plaintiff did not execute the assignment agreement it is contended that they are not a party to the agreement and therefore there is no consideration, rendering the guarantee void.

[32] I have, at some length above, given consideration to the issue of whether or not the plaintiff was a party to the Direct Hire Purchase Assignment to Third Party Agreement. I made a finding of fact above, that after considering the entirety of the facts and circumstances surrounding the transaction and particularly the agreement itself, the plaintiff was indeed a party to the transaction. The mere absence of its signature does not detract from that conclusion on the facts of this case. Accordingly it follows that if the plaintiff was indeed a party to the assignment agreement then the consideration in the guarantee exists or subsists and that the guarantee is not rendered void for want of consideration.

Issue (iii): Alternatively, Whether The Failure Of The Plaintiff To Repossess The Equipment Exonerates Or Diminishes The 1st Defendant's Liability Under 'Direct Hire Purchase Assignment To Third Party' Agreement Or Discharges The Liability Of The 2nd And 3rd Defendants As Guarantors

[33] In considering the salient facts of this case, I set out the dispute and challenges made to PW1's evidence that attempts were made to repossess the equipment over the course of 2001 to 2003. Indeed PW1 was unable from her records to provide express reasons why the attempts at repossession were unsuccessful. What then is the effect of her failure to establish the reasons for the failed repossession? It was put to her that because she could not explain how or why the attempts were unsuccessful it followed that no attempts were made to repossess the equipment.

[34] It is not in dispute that PW1 as an executive of the plaintiff could not possibly have personal knowledge of the attempts made to repossess the subject goods. That is routinely done by agents hired by the plaintiff to go to the subject premises to recover the goods. In the instant case the 1st defendant's premises where the goods were utilised was at Langkap in Perak. It is not surprising therefore that PW1 had no knowledge of the same. However there were no records explaining why the attempts were

A unsuccessful. Does this lacuna in the evidence therefore give rise to the conclusion that no attempts whatsoever were made to repossess the goods?

[35] In order to so conclude, this court would have to be
B satisfied that the several memoranda to repossess dated over a span of several years were all fabricated. There is of course no evidence before the court to warrant such a conclusion. The fact that there are several memoranda to repossess dated intermittently over the period after the defendants defaulted in the repayment of
C their instalment payments establishes *prima facie* that these documents were issued to these agents. There is no evidence before this court that the agents did not attend at the premises. The effect of the cross-examination conducted on PW1 in relation to the attempts made to repossess by the plaintiff disclose that
D the reason why there was no successful repossession of the goods is not explained. It does not follow that because PW1 was unable to explain why the attempts at repossession were unsuccessful that no attempts to repossess were made.

E **[36]** The further contention by learned counsel for the defendants was that as PW1 was a witness giving evidence from the records of the plaintiff, she had no personal knowledge of whether or not such attempts were ever made. However as pointed out earlier, given the fact that the records of the plaintiff were compiled *in*
F *tandem* with events as they occurred, the issuance of the memoranda to repossess over several years, intermittently tends to show the validity of those memoranda. There is no basis for this court to presume that although the memoranda were issued, no visits actually emanated. I therefore make a finding of fact that
G given the plaintiff's records, particularly the memoranda to repossess, there is *prima facie* evidence of attempts made to repossess the goods. As a consequence of the cross-examination, I agree with learned counsel for the defendants that the reason for the failure to repossess, namely the contention of the plaintiff
H that their agents were denied access is not made out. However the contention that there were never any attempts to repossess is not made out, and in any event is a matter to be established by the defendants, given the existence and issuance of the memoranda to repossess.

I **[37]** Turning to the evidence of the defendants on this point, namely that of DW1, he testified that he had stationed a representative at the factory site (now deceased) who would have

told him if any attempts had been made to repossess. He also states that he was at the factory premises every evening. On this basis he contends that there were no attempts to repossess. Having considered his testimony this court is not satisfied that DW1's evidence establishes that there were no attempts at repossession because his evidence relating to a representative stationed there amounts to supposition rather than positive knowledge or evidence of the absence of any attempts to repossess. In essence he is presuming or concluding that there could not have been any attempts to repossess, which is insufficient to establish the fact in issue. Similarly the bare statement that he was present at the factory every evening does not establish that there was no attempt made to repossess.

[38] As a consequence I conclude that while there were attempts to repossess they were not successful. What then is the consequence of a failure to repossess? Clause 10.3 of the Hire Purchase Agreement is relevant to this issue. It provides as follows:

> Upon the termination of this Agreement pursuant to Clause 8 or 9 hereof the Owners may without notice retake possession of the goods and for that purpose by themselves their servants or agents enter upon any land or premises on or in which the goods are or are believed by the Owners to be situated and the Hirer shall upon such termination return to the Owners all necessary licences, registration books or certificates, insurance policy and certificate and other documents (if any) relating to the goods and shall pay to the Owners the hire purchase price of the goods less the aggregate of:
>
> (1) the sums previously paid under the agreement;
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> (2) (deleted)
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> (3) the net proceeds of sale if the goods if repossessed and sold or if not their value as determined by a dealer appointed by the Owners; and
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> (4) a discount for the acceleration of payment calculated by multiplying the hire charges by the sum of all the whole numbers from one to the number which is the number of complete months ...
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> For the purpose of this clause "the net proceeds of sale" shall mean the proceeds of sale after deducting the cost and expense of repossession, storage, insurance and sale. If the net proceeds of sale of the goods repossessed and the amount paid by the

A Hirer pursuant to this Agreement exceed in the aggregate the amount of the hire purchase price (with interest on overdue payments and other sums payable by the Hirer under Clause 5 hereof) the excess shall be repaid to the Hirer. "Hire charges" shall mean the total amount of interest payable under the Agreement.

B

[39] Learned counsel for the 1st defendant submits that cl. 10.3 provides that the 1st defendant as the entity stepping into the shoes of the original hirer is entitled to be accorded either the net proceeds of sale or if not their value as a dealer appointed by the C owners. His construction of the clause is that once the goods are repossessed, then the hirer is entitled to either the proceeds of sale or the value of the goods as determined by a dealer. In this case neither was done, as the goods were not repossessed. Learned counsel therefore initially submitted that in view of the D failure on the part of the owners to repossess the goods, the entire claim was bad in law and the plaintiff entitled to nothing. Upon further questioning by the court an alternative submission was put forward that the 1st defendant was entitled to be accorded a reduction in the sum claimed by the plaintiff, such E deduction to reflect the value of the goods. The troubling issue was that in view of the lack of either a sale value or a valuation by a dealer of the goods, how was such a sum to be estimated, if indeed this line of construction of cl. 10.3 was accepted?

F **[40]** In response to this, learned counsel for the plaintiff maintained that the construction of cl. 10.3 was different. He submitted that in the first place there was no duty or obligation on the part of the owners or the plaintiff to repossess the goods because the words used therein are 'may' which conferred a G discretion upon the owners, rather than making it mandatory that the goods be repossessed. He next submitted that the deduction to be accorded to the hirer for net proceeds of sale or for a valuation as determined by a valuer only therefore arose if the goods were repossessed. If the goods were not repossessed then H he contended that cl. 10.3 simply did not come into play. The net effect of cl. 10.3 therefore he maintained, was not, as contended by the defendants, to accord the hirer a credit for either proceeds of sale or for a valuation of the goods, whether or not repossession was effected, but only to allow for such deduction in I the event the goods were repossessed. In the instant case, he maintained that as the goods were not repossessed, and as there

was no duty upon the owners to do so, the second limb of cl. 10.3 was not invoked and therefore the 1st defendant was not entitled to be afforded any such credit.

[41] I have perused and considered cl. 10.3 of the Hire Purchase agreement as reproduced above. It is my considered decision that the said clause confers upon the owners (the plaintiff) a discretion as to whether or not to repossess the goods. The use of the word 'may' at the commencement of the clause preceding the portion relating to repossession underscores that it is a discretion rather than a duty. Notwithstanding that it comprises a routine practice in hire purchase transactions, the express terms of the contract between the parties prescribes repossession as a discretionary remedy available to the owners for recovery of arrears of hire purchase instalments.

[42] More significantly the second limb of cl. 10.3, in my judgment, appears to specify that the owners are bound to accord the hirer a reduction in the amount claimed such reduction to reflect the net proceeds of sale or valuation by a valuer. As I have determined that repossession is a discretion rather than a mandatory obligation, I agree with learned counsel for the plaintiff that cl. 10.3 allows for a crediting where repossession occurs. Where there is no repossession, no such valuation or crediting can be accorded to the hirer, because the goods, not having been repossessed cannot be either sold or valued. The construction put forward by the defendants is not tenable because a plain reading of the clause discloses that the words 'if not' relate to the word 'sold' and not to the word 'repossessed' in the clause. In other words, the clause when construed as a whole in the context of the agreement provides for a crediting where there is repossession and does not lend itself to the construction that if the goods are not repossessed, then they are nonetheless to be valued and credit accorded to the 1st defendant. If the goods are not repossessed how can the plaintiff undertake a valuation, particularly if the goods are located in the 1st defendant's premises?

Again, can the 1st defendant be accorded credit when the goods remain in the possession of the defendants? The clause does not bear out such a reading.

[43] Giving consideration to the agreement as a whole therefore, I find that the 1st defendant is not entitled to be accorded any credit for the value of the goods as contended by the 1st

A defendant, when there has been no repossession. Such an entitlement only arises when repossession is effected. In the absence of repossession, in the instant case, the hirer remains liable for the full sum claimed by the owners. In arriving at this conclusion I am fortified by the judgments handed down in *Supreme* B *Leasing Sdn. Bhd. v. Lee Gee & Ors*. [1987] 1 LNS 145, *Lynxsquare (M) Sdn. Bhd. & 2 Ors v. UOL Credit Sdn. Bhd.* [2000] 1 LNS 104 as well as *HSBC Bank Malaysia Berhad v. LH Timber Products Sdn. Bhd. & Ors.* [2005] 8 CLJ 249.

C **[44]** Further and in any event an issue that lends support to my conclusion above is the failure of the defendants to make any attempt to surrender or make arrangements for the return of the goods to the plaintiff. This is particularly so when they were making no further hire payments to the plaintiff. To the contrary, D notwithstanding the termination of the agreement between the parties, the defendants made no attempt to deliver up or enable the delivery up of the equipment, but continued to use and benefit from those machines for a further two years well after termination. By admission of the 2nd defendant, the business was E only finally closed down in 2004. Even at that late juncture, the defendants failed or refused to advise the plaintiff that they were closing down the business and that the equipment could be collected. As a consequence the equipment was effectively abandoned at the premises. And this, the 2nd defendant testified, F was reasonable, because the obligation to repossess fell squarely on the plaintiff and not on the defendants.

[45] I found this part of the evidence to be entirely unjustifiable. It appeared to this court that it was incumbent upon the G defendants to advise the plaintiff of the closure of its business and the fact that the plaintiff's equipment was being left to effectively deteriorate at the premises where the 1st defendant's factory had once operated. As a consequence of the failure of the 2nd and 3rd defendants to take the rudimentary step of informing the H plaintiff of this fact, the reason for the resultant deterioration and decay of the equipment rendering it useless must lie with the defendants, not the plaintiff.

[46] I now turn to the second part of issue (iii) namely whether the failure to repossess the equipment entitles the 2nd and 3rd I defendants to be discharged as guarantors. In essence these defendants contend that by virtue of ss. 92 and 94 of the Contracts Act 1950, the 2nd and 3rd defendants as sureties are

entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship was entered into and if the creditor loses the security the surety is discharged to the extent of the value of the security.

[47] Do the goods comprising the subject matter of the hire purchase agreements comprise a 'security'? The goods belong to the plaintiff not the defendants or any third party and were not given to the plaintiff as security for the financing facilities afforded by the plaintiff. In Words Phrases and Maxims Legally and Judicially Defined, security is defined as '... signifying that which makes secure or certain. In its proper use, it relates to pecuniary matters, and often consists of a promise or right with or without possession of the thing upon which it rests. It implies in its common acceptation that which prevents loss or makes safe.' An example is given of assets offered by a borrower to a lender as collateral. If the borrower defaults on the repayment of the loan, the lender has the right to sell the asset and retain the proceeds up to the amount owing. In these circumstances, learned counsel for the 2nd and 3rd defendants submitted that the goods comprising the subject matter of the hire purchase agreement, which belong to the plaintiff in the first place, amounted to 'security'. It is clear to this court that the subject goods, which belong to the plaintiff cannot comprise 'security' as envisaged by these defendants, and I so find. The rest of the contention that followed, namely that the plaintiff had 'lost' the security by failing to repossess the equipment resulting in the discharge of the guarantors was so far misconceived as to be rejected outright.

[48] Further and in any event, s. 92 envisages that the owner, or creditor or the plaintiff in the instant case has to omit to do any act which his duty to the surety requires him to do resulting in the eventual remedy of the surety himself against the principal debtor being impaired. In the instant case, I have concluded above that the plaintiff has no mandatory duty to repossess. As such there has been no omission of a duty to the sureties. In any event the equipment does not afford any eventual remedy for the surety against the 1st defendant. Section 92 is simply inapplicable.

[49] As for s. 92, on similar reasoning the subject goods cannot comprise security to the plaintiff afforded to ensure due performance of the contract as the goods belong to the plaintiff.

A This clause speaks of the creditor losing or parting with the security. In the instant case the defendants at all material times had the benefit and use of the equipment and chose not return the same and chose, somewhat wilfully, to leave the equipment to deteriorate at the premises where they were left. It will behoves
B the defendants to now claim that it is the plaintiff that has allegedly 'lost' what they claim to be a security. This contention is equally misplaced and warrants short shrift. It is entirely without merit as it amounts to a misapplication of s. 94. This contention is also rejected out of hand.

C

[50] In all the circumstances of the case, I am satisfied that the plaintiff has proved its case on a balance of probabilities. Accordingly the plaintiff is entitled to judgment against the 1st, 2nd and 3rd defendants as pleaded in its amended statement of claim
D as per prayers (a), (b) and (c) of para. 17 as varied in relation to the interest elements only and shown below:

(a) Judgment in the sum of RM270,226.41 against the 1st, 2nd and 3rd defendants; together with

E (b) Interest on the sum of RM134,512.44 at the rate of 14.93% per annum from 11 May 2003 until date of judgment;

(c) Interest on the sum of RM87,725 at the rate of 14.95 per cent from 11 May 2003 until date of judgment;

F

(d) Interest from the date of judgment to run at 8% per annum until the date of final settlement;

(e) Costs to be taxed or awarded by the court upon hearing from the parties when the decision is handed down.

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